Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 88-360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN BYRON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA;
and DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN BYRON, *Pro Se*
81-40 Woodhaven Boulevard
Glendale, New York 11385
(718) 847-0241

Questions Presented

1. Can a voluntary compact such as the Voluntary State agreement which brought some members of the New York City Fire Department under Social Security coverage, but not all members, be constitutional when it does not allow the enumerated power of Congress to tax to be exercised?
2. Whether or not the firefighters of New York City have been separated into a "taxpaying" and a "non-taxpaying" group by the agreement as some are paying for Title II coverage and some are not?
3. Are State and Local employees constitutionally exempt from Social Security taxation or coverage in any form because of the 10th Amendment?

List of Parties

The caption of the case contains the names of all parties to the proceedings in the courts below whose judgment is sought to be reviewed.

The petitioner on this petition for a writ of certiorari is, John Byron, Pro Se.

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Statement of Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit in this case was filed on May 31, 1988.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. Section 1254, to review the judgment of the Court of Appeals, by writ of certiorari granted upon timely petition of a party to a civil action, after rendering judgment.

Constitutional and Statutory Provisions Involved

Article 1, Section 8, clause 1 of the United States Constitution; 10th Amendment; Art. 6, paragraph 2; 28 U.S.C. Sec. 2201 and 2202, 28 U.S.C. Sec. 1651.

Statement of the Case

The Voluntary State agreement is a voluntary compact between the Secretary of Health, Education, and Welfare and the State of New York. This voluntary compact brought most of the firefighters of New York City under Social Security coverage, but I am not covered. The agreement was termed voluntary because Congress did not exercise its taxing power under Article I, Section 8, clause 1.

The first group of State and Local employees brought under coverage were those who were not members of a retirement system. If two-thirds of these employees voted for Social Security coverage then all of them were required to pay for coverage. This group is called an "Absolute Coverage Group."

Those who were members of a retirement system such as the firefighters, were treated differently. Fire Department members were told in the latter part of 1957, that they were eligible for Social Security, but they must choose coverage. I rejected coverage but expected that I would have to pay later as Social Security is taxation. Those members who opted for coverage were required to make a retroactive payment of $178.50 back to March 16, 1956. The payment was made in December, 1957, with coverage effective January 1, 1958. A referendum was carried out by the firemen, but only those who joined the system were allowed to vote. This group of employees were the "Retirement System Coverage Group."

After January 1, 1958, some members were paying for Social Security coverage and others were not. I have said that this

created discriminatory taxation by voluntary means. If Social Security could be put in effect under the enumerated power to tax in pursuance of the constitution no separation of the members could occur. Section 218(d)(6)(C) describes the division of a group of employees into two groups. Those wanting (OASDI) coverage and those who do not. It is Section 218 of the Social Security Act as amended, that does not allow the taxes to be imposed on State and Local employees.

By the terms of the agreement the State is to pay "amounts equivalent to the sum of the taxes which would be imposed," although Congress is not exercising its delegated taxing power. This money is to be paid into the Treasury of the United States at such time or times as the Secretary of Health, Education, and Welfare shall by regulation prescribe. The State and its

instrumentalities are agreeing to pay for Social Security coverage as if they were employers and employees in private industry. They were agreeing to pay for all who were similarly situated.

The agreement can be modified. Section 218(p)(1) of the Act provides any agreement with the State of New York may be modified pursuant to section (c)(4) of this section to apply to services performed by employees of such State or any political subdivision thereof in any policeman's and fireman's position.

A request for a modification by the State brought on an amendment by Congress under Section 218(d)(6)(F). An amendment allowed those who did not choose coverage originally an opportunity to join the system retroactively and voluntarily, and it seemed this would always continue. Those joining at a later date were required

to pay back to the date of original coverage. Retroactive coverage was the only way a firefighter could receive the same over-all compensation from his employer as those already covered.

There were eleven opportunities to join the system. Those firefighters who decided to join in 1969 were required to pay $2,638.20 retroactively. Each time the employees paid, the employer was required to pay also. Retroactive coverage remedied the disparity in compensation from the employer and was allowing every firefighter to acquire coverage and equal benefits. Without notice this was the last time retroactive coverage was allowed. Section 218(d)(6)(F) now reads "prior to 1970." This cut-off date denied me the same preferential treatment extended to others and, disqualified me from the same insurance and benefits as my co-workers

had. It deprived me of the same compensation that others are receiving from the employer and is a severe form of punishment by legislation.

All future employees entering the fire department were made to pay for Social Security coverage as if it had been constitutionally imposed. They were given no choice.

When the City of New York allowed some members of the fire department to opt for Social Security coverage they entered into an unfair labor agreement with the federal government. The city paid $178.50 retroactively back to March 16, 1956, for each member who opted for coverage. In addition it has paid $21,107.99 more for the member with Social Security coverage than for the member without coverage up until the end of 1984. This changed the wage relationship of the members and

created disparity of compensation where parity had existed prior to the agreement. As Social Security is a federal tax it created a "taxpaying" and a "non-taxpaying" group in fact by the voluntary means resorted to and, an unequal benefit structure. The over-all compensation (salary) of the member with coverage exceeded that of the member without coverage by the amount of money that the employer paid to the system. This caused different rates of compensation to be paid to the members for identical work. Retroactivity was remedial legislation that was putting everyone in the taxpaying group and it remedied the difference in compensation from the employer.

The Internal Revenue Service is not involved in the coverage or collection of Social Security contributions from State and Local employees, because a

constitutional tax has not been laid. However, F.I.C.A. is in effect and the employees pay it.

Reasons for Granting the Writ

This case involves an important question. Can the Congress legislate on the subject of Social Security and not exercise the enumerated power to tax? To do such a thing eliminates any possibility of its being put in effect in pursuance of the Constitution. Under the Voluntary State Agreement, Social Security, a known tax of the federal government, is put in effect in such a way that it is not imposed under Article I, Section 8, clause 1. To put a known tax of the federal government in effect this way is in contravention of Article I Section 8, clause 1.

According to the Constitution the taxes of Congress must be imposed. When Congress legislates the acts of Congress must have a definite and substantial relationship grounded in logic and experience to some enumerated power. The only reasonable power to associate Social Security with is the taxing power. As the government of the Union is acknowledged by all to be one of enumerated powers, the taxing power must be exercised to make it a constitutional tax for State and Local employees, but the 10th Amendment prohibits this.

Helvering v. Davis, 1937 stated "these taxes are not applicable to services for the state governments," (p. 620) and that decision is a Constitutional decision that still stands. It was said that, "the exemptions from taxation did not invalidate the legislation." (p. 646). For Congress to impose the tax would be in

contravention of the 10th Amendment. This is the reason why Social Security was made voluntary under the agreement.

State and Local employees are immune from Social Security taxation in any form and the immunity is absolute. The Voluntary Agreement is in conflict with the decision in Helvering v. Davis, 301 U.S. 619 (1937), and the Social Security Act of August 14, 1935. The Act states under Title VIII Section 811(b) the term "employment" means any service of whatever nature, performed within the United States by an employee for his employer, except- (7) service performed in the employ of a State, a political subdivision thereof, or an instrumentality of one or more States or political subdivisions.

In Helvering v. Davis, 301 U.S. 619, (1937), the government stated: "Both the employee tax (a special income tax) and the

employer tax (an excise) comply with the requirement of uniformity." When Social Security went from the private to the public sector it retained the meaning it had. It consists of two indirect taxes.

But under the Agreement the taxes cannot attain uniformity because constitutional power is not exercised. The taxes were made voluntary or a matter of choice. As some firefighters pay for Social Security coverage while others do not a discriminatory policy was set in motion. The Agreement has in fact created a "taxpaying group" and a "non-taxpaying group" among those who are similarly situated. Choice has nothing to do with taxation, it is a matter of constitutional power. If some firefighters pay for Social Security coverage then all of them should be paying. The validity of the taxes

should be determined for they cannot be constitutional without imposition.

On page 8 in this case the government states: "The Magistrate also recognized that Congress has wide latitude in selecting objects of taxation and has commonly imposed taxes solely on those citizens participating in a particular program, such as OASDI." If this was done and only those firefighters who agreed to pay for Social Security coverage had the tax imposed upon them, it is still a discriminatory tax. When Congress selects firemen to be taxed, all firemen must be taxed. The firemen in Georgia must pay as well as the firemen in Maine, the tax must be nationwide. Any federal "indirect" tax must be made applicable throughout the United States.

Discriminatory taxation must be among those things that are prohibited absolutely

by the constitution, such as ex-post facto laws. Those who are paying are paying for all practical purposes on a compulsory basis. Since January 1, 1958, everyone coming into the Fire Department has had to pay.

This legislation punishes the worker without coverage as he does not have the insurance and benefits his co-workers have. It affects the life of the individual and makes him work for less over-all compensation from his employer than those who are covered. This discriminatory taxation policy could be remedied by declaring the Voluntary State Agreement unconstitutional. This would stop the financial punishment of those without coverage and cease placing them at an economic disadvantage.

Title II benefits are in contravention of the reserved powers of the State.

F.I.C.A. contributions in any form are not applicable to State and Local employees.

Conclusion

For all the reasons set forth herein, the Court should grant the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

John Byron, Pro Se.

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of May, one thousand nine hundred and eighty-eight.

P r e s e n t: HONORABLE THOMAS J. MESKILL,

HONORABLE RALPH K. WINTER,

Circuit Judges,

HONORABLE NEAL P. McCURN,

District Judge.*

JOHN BYRON,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant-Appellee.

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* Honorable Neal P. McCurn, United States District Judge for the Northern District of New York, sitting by designation.

This is an appeal, pro se, from a judgment entered in the United States District Court for the Southern District of New York, Haight, J., dismissing plaintiff-appellant John Byron's complaint for failure to state a claim upon which relief could be granted. See Fed. R. Civ. P. 12(b)(6). Byron, a New York City firefighter, alleged that the voluntary program under which state and municipal workers in New York State may opt for Old-Age, Survivors, and Disability Insurance, see 42 U.S.C. § 418, was unconstitutional, in violation of the Equal Protection Clause of the Fourteenth Amendment. Byron also alleged that the same program was an unconstitutional delegation of Congress' taxing power.

This cause came on to be heard on the transcript of record from said district court and was argued by appellant pro se and by counsel for the appellee.

Because Byron's claim has changed during these proceedings, it is difficult to rule on the question of standing. Nevertheless, even if he has standing to bring this action, he cannot prevail on the merits. The judgment of the district court is AFFIRMED substantially for the reasons stated in Judge Haight's opinion below dated December 17, 1987, adopting and endorsing Magistrate Francis' Report and Recommendation dated January 15, 1987.

Thomas J. Meskill, U.S.C.J.

Ralph K. Winter, U.S.C.J.

Neal P. McCurn, U.S.D.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise replied upon in unrelated cases before this or any other court.

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN BYRON, Plaintiff,	85 Civ. 3778 (CSH)
-against-	REPORT AND RECOMMENDATION
UNITED STATES OF AMERICA and DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	

TO THE HONORABLE CHARLES S. HAIGHT, JR., U.S.D.J.:

This action has been referred to me for a report and recommendation. Plaintiff, John Byron, contends that the New York State Coverage Agreement, which governs the application of federal Old-Age, Survivors, and Disability Insurance ("OASDI") to state and local employees, violates the Equal Protection Clause of the Fourteenth Amendment and Article I, § 8, of the United States Constitution.

In a report and recommendation dated April 3, 1986, I recommended that the complaint be dismissed for failure to state a claim. In a letter dated April 30, 1986, plaintiff objected to the dismissal of the complaint, and asserted a new claim that fire department employees are treated differently from other state and local employees in that they, according to plaintiff, are the only group divided into "taxpaying and non-taxpaying groups." The Court deemed the plaintiff's complaint to be amended pursuant to Rule 15(a), Fed.R.Civ.P., so as to assert a new equal protection claim and remanded the case to me for a further report and recommendation. I now recommend that the defendant's 12(b)(6) motion to dismiss the additional claim be granted.

Background

The Social Security Act of 1935 as amended ("the Act"), 42 U.S.C. § § 301, et seq., established the statutory insurance program known as OASDI. In 1950, Congress added Section 218 to the Act, 42 U.S.C. § 418, which required the Secretary of Health and Human Services, at the request of any state, to enter into an agreement with that state for the purpose of extending OASDI coverage to state and local employees. 42 U.S.C. § 418(a)(i).[1] New York entered into a State Coverage Agreement in 1953.

There are two types of coverage groups provided for by State Coverage Agreements. The first, called an "Absolute Coverage

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[1] Prior to the enactment of Section 218 in 1950, state and local employees were excluded from OASDI coverage. OASDI eligibility is now extended to those state and local employees who are specifically covered by a state agreement pursuant to Section 218. See 42 U.S.C. § 410(a)(7)(A).

Group" consists of employees who are not covered by a retirement system other than OASDI, and OASDI coverage is extended to all members of such a group at the state's request. See 42 U.S.C. § 418(b)(5). The second type of coverage group, the "Retirement System Coverage Group" ("RSCG"), consists of employees who are covered by a pre-existing retirement system. See 42 U.S.C. § 418(d)(4). The Act permits certain states, including New York, to divide each RSCG into parts or retirement systems consisting of those employees who have chosen OASDI coverage and those who have not. See 42 U.S.C. § 418(d)(6).

Plaintiff alleges that he is a fireman with the New York City Fire Department. Complaint at 1. In 1958 employees of the New York City Fire Department became eligible for OASDI coverage under a

modification of the Agreement which allowed the Fire Department to be divided into covered and noncovered employees on the basis of each employee's choice. Plaintiff and other members of the fire department retirement system who initially indicated that they did not want OASDI coverage had numerous opportunities to switch into the covered employee category.[2] Id. at 5. The Act establishes a 1970 cut-off date for individuals to transfer from a noncovered to a covered employee category, 42 U.S.C. § 418(d)(6)(F). The plaintiff therefore can no longer switch to the covered category and become eligible for OASDI

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[2] Such opportunities are set forth in Modification 105, October 1, 1959; Modification 117, December 31, 1959; Modification 134, December 31, 1961; Modification 140, June 30, 1962; Modification 148, December 31, 1962; Modification 175, December 31, 1965; Modification 183, June 30, 1966; Modification 190, December 31, 1966; Modification 213, December 31, 1968; Modification 222, December 31, 1969.

under the terms of the Agreement. Id at 1-2.

By the amendment to his complaint, the plaintiff challenges on equal protection grounds the constitutionality of allowing Fire Department employees to be divided into "taxpaying and non-taxpaying groups" under the New York State Coverage Agreement, while other types of employees are subject to group-wide coverage.[3]

Discussion

Plaintiff appears pro se in this action and the complaint therefore must be liberally construed. Villante v. Department of Corrections, 786 F.2d 516, 520 (2d Cir. 1986); Massop v. Coughlin, 770

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[3] The plaintiff characterizes the allegedly unconstitutional classification as discriminating between firemen and all other groups. However, because the statutory classification distinguishes instead between "Absolute Coverage Groups" and "Retirement System Coverage Groups," see 42 U.S.C. § 418, it is that classification which should be scrutinized.

F.2d 299, 301 (2d Cir. 1985) (citing Haines v. Kerner, 404 U.S. 591, 520 (1972)). Moreover, the material allegations of a complaint are taken as admitted and the complaint is to be construed in favor of the plaintiff. See, e.g., Warth v. Seldin, 422 U.S. 490, 501 (1975).

Social and economic legislation that does not employ suspect classifications or impinge on fundamental rights does not violate the equal protection components of the Fifth or Fourteenth Amendments when the legislative classification is rationally related to a legitimate government purpose. Schweiker v. Wilson, 450 U.S. 221, 234 (1981). Statutory classifications analyzed under the rational relationship standard are entitled to a strong presumption of constitutionality. Mathews v. de Castro, 429 U.S. 181, 185 (1976), and equal protection challenges to Social Security

legislation have been repeatedly analyzed under this standard. Schweiker v. Wilson, 450 U.S. 221 (1981); Hisquierdo v. Hisquierdo, 439 U.S. 572, 575 (1979); Weinberger v. Salfi, 422 U.S. 749 (1975); see also United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 174-76 (1980) (discussing standard of review).

The decision of Congress to allow an RSCG which divides firemen -- who were subject to a pre-existing retirement system -- into two retirement systems meets the rational relationship standard. The initial congressional decision to allow an RSCG plan was made because the federal program may provide types of protection not available under a pre-existing retirement plan. H.R. Rep. No. 1300, 81st Cong., 1st Sess. 11 (1949). In 1949, the House Ways and Means Committee recommended that members of an existing retirement system be

extended coverage by treating them as a separate coverage group. That coverage would have to be provided to all members of the coverage group if the plan was approved by a two-thirds majority vote in a written referendum. Id. The Senate Finance Committee, however, rejected the House proposal because the Committee believed that all coverage of state and local employees should be on a voluntary basis. S. Rep. No. 1689, 81st Cong. 2d Sess. 13-14, reprinted in [1950] U.S. Code Cong. and Ad. News 3287, 3302.

The House provision was approved, however, in 1954 because several states and many local governments had been required to secure OASDI coverage for their employees by dissolving their existing retirement systems. The 1954 Social Security Amendments provided for OASDI coverage of state and local employees covered by a

retirement plan if a majority of the eligible system members voted in favor of coverage in a referendum. S. Rep. No. 1987, 83d Cong., 2d Sess. 6, reprinted in [1954] U.S. Code Cong. and Ad. News 3710, 3715.

However, in 1956, at the request of several states, Congress permitted the division of an RSCG into two parts, "one part to consist of positions of members who desire coverage and the other to consist of the position of members who do not desire coverage." S. Rep. No. 859, 85th Cong. 1st Sess. 2-3, reprinted in [1957] U.S. Code Cong. and Ad. News 1749, 1750. This type of coverage was provided for policemen and firemen in five states which had requested it. Id.

The Senate Committee had found that the RSCG plan which did not allow a division

between employees who wanted OASDI coverage and those that did not had

> imposed an undesirable limitation upon the ability of the states to afford employees the combined protection of the basic federal system and a state or local system. [I]f old-age and survivors insurance is to be extended to the retirement system members, it must be added on top of their existing protection in order to satisfy those members who prefer to retain the full protection of their existing system. In some cases the employees or the employing governmental unit may be unwilling or unable to pay the combined contributions that would be required under such an arrangement.

S. Rep. No. 2133, 84th Cong., 2d Sess. 11, reprinted in [1956] U.S. Code Cong. and Ad. News 3877, 3886.

This type of coverage was provided to New York firemen, at the request of the state, in 1957. This was allowed because "existing law provided adequate assurance that OASDI coverage will be extended only to groups of policemen and firemen who want such coverage." S. Rep. No. 859, 85th

Cong. 1st Sess. 2-3, reprinted in [1957] U.S. Code Cong. and Ad. News 1749, 1751. Firemen would have a "voice in any decision" to cover them under OASDI. Id.

This legislative history provides ample proof that the Congressional decision to permit the division of coverage groups into two parts was rational. The plan is based on a sound policy of providing coverage only to those employees who wished to have the additional coverage of OASDI in addition to their pre-existing retirement plan. The plan allowed those employees who did not wish to pay for additional coverage to decline OASDI participation. Most importantly, the plan allowed states to provide OASDI coverage to employees with a pre-existing retirement system without having to dissolve the existing retirement plan. This had been a consistent concern of Congress. See 42 U.S.C. § 418(d)(2).

The plan also allows only those states that wish to extend this type of coverage to state and local employees to do so. The federal government has no voice in the decision of the state as to which type of coverage it would like to provide to these employees. It is the state which decides to provide either absolute coverage or a bifurcated RSCG. 42 U.S.C. § 418 (d)(6)(C).

Thus, plaintiff's argument that it is unconstitutional for firemen to be divided into "taxpaying and non-taxpaying groups" is without merit. It is therefore recommended that this Court grant defendant's motion to dismiss the complaint for failure to state a claim upon which relief may be granted. Pursuant to Rule 7 of the Rules of Proceedings Before a United States Magistrate, the parties shall have ten (10) days from this date to file

written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Charles S. Haight, Jr., Room 2103, and to the chambers of the undersigned, Room 2904.

Respectfully submitted,

_____
JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE

Dated: New York, New York
January 15, 1987

Copies mailed this date to:

John Byron
81-40 Woodhaven Boulevard
Glendale, New York 11385

David R. Lewis, Esq.
Assistant United States Attorney
One Saint Andrew's Plaza
New York, New York 10007

APPENDIX C

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN BYRON, Plaintiff,	85 Civ. 3778 (CSH)
-against-	MEMORANDUM OPINION AND ORDER
UNITED STATES OF AMERICA and DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	

HAIGHT, District Judge:

Plaintiff, appearing pro se, contends that the New York State Coverage Agreement which governs the application of federal Old-Age, Survivors, and Disability Insurance (OASDI) to state and local government employees violates the New York and United States Constitutions. I previously referred defendant's motion to dismiss the complaint to the Hon. James C. Francis IV, United States Magistrate, for a report and recommendation. In a letter

response to Magistrate Francis' recommendation that the complaint be dismissed plaintiff asserted a new claim.[1] By order dated June 9, 1986 I deemed the complaint amended to assert the new claim, and re-referred the case to Magistrate Francis.

The new claim plaintiff asserts is that fire department employees are treated differently than other state and local employees in that they are divided into "taxpaying and non-taxpaying groups." By Report and Recommendation filed January 15, 1987, Magistrate Francis recommends that this additional claim also be dismissed. Plaintiff has filed a timely objection to that Report and Recommendation consisting of several closely written pages essentially restating his position before

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[1] Magistrate Francis' initial Report and Recommendation was filed April 3, 1986. Plaintiff's letter objection/amendment was undated, and was received in my chamber on April 30, 1986.

the Magistrate. The Government, in a letter dated January 29, 1987, indicated its concurrence with the Magistrate's Recommendation.[2]

The Magistrate's comprehensive Report explains that New York's firefighters, a group which includes plaintiff, are covered by two types of social security insurance. One group of firefighters are members of the "Absolute Coverage Group." This group, and their family members, are completely covered under the federal statutory insurance program known as OASDI. See 42 U.S.C. §301, et seq. The other group of firefighters are members of the "Retirement System Coverage Group." This group is insured by a retirement system that existed

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[2] The Government maintains its objection to that portion of the original Report and Recommendation which found that plaintiff has standing to bring this action. Because I agree with the Magistrate's conclusion that no claim is stated by plaintiff, I do not reach this question.

prior to the enactment of federal legislation which established OASDI and which made OASDI available to public employees.

In 1958, New York State modified its Coverage Agreement with the federal Government and thereby permitted members of the New York City Fire Department to choose between membership in the OASDI "Absolute Coverage Group" and the "Retirement System Coverage Group." Plaintiff and all other firefighters who initially chose to remain with the Retirement System Group were given numerous opportunities to switch into the Absolute Coverage Group. The federal statute which permits this duality of coverage sub-groups within a state having a Coverage Agreement established a 1970 cut-off date, after which individuals were not permitted to transfer from a non-OASDI

covered to an OASDI covered category. See 42 U.S.C. §418(d)(6)(F).

As a consequence of that cut-off date, plaintiff and other firefighters who are similarly situated cannot become members of the Absolute Coverage Group. Although plaintiff characterizes the classification scheme he challenges as one that distinguishes between "taxpaying" and "non-taxpaying" groups, in fact the only classification scheme which exists is that which distinguishes between members of the Absolute Coverage Group and members of the Retirement System Coverage Group. See 42 U.S.C. §418. Accordingly, it is only that classification which is subject to constitutional scrutiny.

As the Magistrate notes in his Report, social and economic legislation that does not employ suspect classifications or impinge on fundamental rights is

constitutional if the classification employed by the legislature is rationally related to a legitimate government purpose. Furthermore, such classifications are entitled to a strong presumption of constitutionality. Report at 5, citing Schweiker v. Wilson, 450 U.S. 221, 234 (1981); Mathews v. de Castro, 429 U.S. 181, 185 (1976).

The Magistrate's thorough review of the relevant legislative history demonstrates that Congress acted in furtherance of the legitimate government purpose of providing adequate retirement and disability insurance to public employees while avoiding imposition of partially redundant retirement insurance on public employees who were already covered by a retirement plan and who were unwilling to voluntarily switch to full OASDI coverage. Report at 5-9.

Accordingly, I adopt the Magistrate's conclusion that the classification plaintiff challenges herein is constitutional.[3]

Conclusion

The Report and Recommendation dated January 15, 1987 is adopted in its entirety. The Clerk is directed to dismiss the complaint.

Dated: New York, New York
December 15, 1987

CHARLES S. HAIGHT, JR.
U.S.D.J.

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[3] On March 6, 1987 plaintiff submitted a lengthy document captioned "Motion for Judgement on the Pleadings." No new arguments are presented in this document. Accordingly, I deny the motion.

APPENDIX D

APPENDIX D

Relevant Constitutional and Statutory Provisions.

United States Constitution; Article 1, Section 8, Clause 1.

The Congress shall have the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

United States Constitution; 10th Amendment.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Constitution; Article VI paragraph 2.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Title 28, United States Code, Section 1651.

Section 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Title 28, United States Code, Section 2201.

Section 2201

In a case or actual controversy within its jurisdiction, except with respect to federal taxes other than actions brought under Section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Title 28, United States Code.

Section 2202. Further Relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing against any adverse party whose rights have been determined by such judgment.

APPENDIX E

APPENDIX E

RELEVANT SECTIONS OF THE VOLUNTARY STATE AGREEMENT

AGREEMENT BETWEEN

THE SECRETARY OF HEALTH, EDUCATION, AND

WELFARE

OF THE UNITED STATES

AND

THE STATE OF NEW YORK

CONCERNING

FEDERAL OLD-AGE SURVIVORS INSURANCE

COVERAGE FOR PUBLIC EMPLOYEES OF THE

STATE AND ITS POLITICAL SUBDIVISIONS.

The Secretary of Health, Education, and Welfare of the United States (hereinafter called the Secretary), and the State of New York (hereinafter called the State), hereby agree, in accordance with the terms and conditions stated in this agreement, to extend, in conformity with section 218 of

the Social Security Act, and Article 6 of the Civil Service Law of the State, as added by Chapter 619 of the New York Laws of 1953, the insurance system established by Title II of the Social Security Act, to services performed by individuals as employees of the State and as employees of those political subdivisions of the State listed in the appendix attached hereto and made a part hereof, except services expressly excluded from this agreement. (p. 1)

The State will pay to the Secretary of the Treasury of the United States at such time or times as the Secretary of Health, Education, and Welfare may by regulation prescribe, amounts equivalent to the sum of the taxes which would be imposed by sections 1400 and 1410 of the Internal Revenue Code if the services of employees covered by this agreement constituted employment as defined in section 1426 of such code. (p.3)